TRADIMAS SDN BHD v. METROBRITE ENGINEERING SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
MAIRIN IDANG JC
[SUIT NO: KCH-22-78-2011]
19 JANUARY 2015

PARTNERSHIP: *Existence of partnership – Dispute as to existence – Essential elements of partnership – Whether present and satisfied – Whether relationship of parties was one of partnership – Partnership Act 1961, s. 3*

Pursuant to a contract, China Yunnan was the subcontractor of PPES Works (Sarawak) Sdn Bhd in respect of the construction and completion of a proposed project in Sarawak ('the works'). On 30 September 2003, China Yunnan entered into a sub-contract agreement with the third defendant ('sub-contract agreement') for the construction and completion of the works at the price of RM19,060,000. The third defendant then allocated portions of the said works to the plaintiff, the first defendant and another company called Bangkit Anyau Sdn Bhd ('BASB') which was subsequently replaced by the second defendant to complete the rest of the portion of the works initially allocated to BASB ('parties'). The third defendant received payments from China Yunnan and made payments to the parties in respect of their portions of the works completed based on the sub-contract sums. In the present suit, the plaintiff claimed against the first and second defendants, *inter alia*, for an order for an account to be taken of what was due to the plaintiff from the first and second defendants in respect of the plaintiff's entitlement to the remaining sub-contract price for the portion of their works done. The issues that arose for the determination of the court, *inter alia*, were (i) whether the relationship of the parties was one of partnership; (ii) whether the plaintiff and the first and second defendants were partners in an unregistered consortium to undertake certain works for China Yunnan and that the third defendant was their appointed agent authorised by them to facilitate the affairs of the consortium.

Held (dismissing plaintiff's action with cost):

(1) Pursuant to s. 3 of the Partnership Act 1961, three elements must be present in the relation of persons before it is recognised as a partnership *ie*, (i) there must be a business; (ii) carried out in common between the partners; and (iii) with a view to making profit. On the facts, the first element was satisfied as the parties were all in the construction business where they undertook certain works allotted to them with an agreed sum to be paid to them by the third defendant. (paras 23 & 24)

(2) With regards to the second element, the plaintiff had full control of their portions of the works to the exclusion of the others. The second defendant undertook the road portion of the works and received payments directly from the third defendant with liberty to spend the same without restrictions from the partnership consortium or the plaintiff. In the circumstances, there was not a single business by the parties. Each party intended a separate business with there being no business in common. Therefore, the plaintiff had not proven the second element. (paras 25 & 27)

(3) The basic idea of partnership was that the business was set up for the sake of making money. The parties carried out their works independently and upon completion, the third defendant paid the parties the sub-contract sums. There was no evidence that all payments made by the third defendant would be put in the consortium's account and there was also no evidence of the profit of the so called consortium for the distribution of the parties. Thus, the third element was also not satisfied. (para 26)

Case(s) referred to:

Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor [1991] 3 CLJ 2834; [1991] 2 CLJ (Rep) 294 HC ***(refd)***

Chooi Siew Cheong v. Lucky Heights Development Sdn Bhd [1995] 2 CLJ 11 FC ***(refd)***

Chua Ka Seng v. Boonchai Sompolpong [1993] 1 SLR 482 CA ***(refd)***

Direct Scope Sdn Bhd v. Kolektra Recreation Sdn Bhd & Maseba Sdn Bhd [2013] 1 LNS 1408 HC ***(refd)***

Tham Kim Fai v. Ng Kon Seong [2006] 4 CLJ 634 HC ***(refd)***

Legislation referred to:

Partnership Act 1961, s. 3(1)

For the plaintiff - Bexter Michael; M/s Ee & Lim Advocs

For the 1st & 2nd defendants - Orlando Chua (Christopher Hii with him); M/s Wong, Orlando Chua & Kuok Advocs

Reported by Sandra Gabriel

JUDGMENT

Mairin Idang JC:

[1] On 21 November 2014, I delivered my decision. I dismissed the plaintiff's action against the two defendants with costs of RM10,000 to each of them. There was already a default judgment entered against the third defendant.

[2] In this suit the plaintiff had prayed for the following:

(i) Judgment for the sum of RM1,323,059.18;

(ii) An order for an account to be taken of what is due to the plaintiff from the first and second defendants and/or the defendants in respect of the plaintiff's entitlement to the remaining subcontract price for portion A of the works;

(iii) An order for all necessary and proper inquiries and directions for the taking of such account;

(iv) Judgment for the amount found due to the plaintiff after the taking of such account;

(v) Interest on the sum of RM1,323,059.18 and/or the amount found due after the taking of such account at the rate of 8% per annum or such other rate as the court shall deem just from 19 August, 2007, until final payment;

(vi) costs; and

(vii) Such further or other relief as the court shall deem fit.

[3] The parties agreed to the following facts:

(i) China Yunnan was the subcontractor of PPES Works (Sarawak) Sdn Bhd. (Co. No. 209892-K) (for brevity, "PPES Works") in respect of the construction and completion of the proposed Jalan Ng. Bangkit/Muarsa Lebaan, Bintangor, Sarikei Division, Sarawak (Section CHO+000-CH6+300) (for brevity, "the works") under a contract between them (for brevity, "the main contract");

(ii) On 30 September 2003, the third defendant entered into subcontract agreement with the China Yunnan of idem date (for brevity, "the subcontract agreement") for the construction and completion of the works at the subcontract price of RM19,060,000 (for brevity, "the subcontract price") and on conditions as provided therein;

(iii) The works was completed on or about 22 July 2006; and

(iv) The defects liability period of the works of 12 months under the subcontract agreement expired on 21 July 2007.

[4] The agreed issues to be tried are as follows:

(i) Whether the plaintiff and the first and second defendants were/are partners in an unregistered consortium to undertake certain works for China Yunnan Road & Bridge Engineering (M) Sdn Bhd in respect of the construction and completion of the proposed Jalan Ng. Bangkit/ Muara Lebaan, Bintangor, Sarikei Division, Sarawak and that the third defendant were/are their appointed agent authorised by them to facilitate the affairs of the consortium;

(ii) Whether the plaintiff is entitled to the sum claimed; and

(iii) Whether the first and second defendants are liable to account to the plaintiff the sum claimed or such other sum after the taking of such account.

[5] Now I will do some house-keepings. In my grounds of judgment I shall refer to the alleged partnership consortium between plaintiff and the first and second defendants as the Consortium; China Yunnan Road & Bridge Engineering (M) Sdn Bhd as China Yunnan; the works awarded by China Yunnan to the third defendant as the works; the portions of the works allotted to the parties as plaintiff's portion, first defendant's portion and second defendant's portion respectively. I shall also refer to the plaintiff and the first and second defendants as the parties where relevant. There were only three witnesses during the trial. The parties had called one each. Mr Ting Yew King for the plaintiff (PW1). Mr Wong Ting Yew for the first defendant (1DW1). Mr Lau Kiiung Pew for the second defendant (2DW1)

[6] These are the parties' submissions in respect of the respective agreed issues.

Whether The Plaintiff And The First And Second Defendants Were/Are Partners In An Unregistered Consortium To Undertake Certain Works For China Yunnan Road & Bridge Engineering (M) Sdn Bhd In Respect Of The Construction And Completion Of The Proposed Jalan Ng. Bangkit/ Muara Lebaan, Bintangor, Sarikei Division, Sarawak And That The Third Defendant Were/Are Their Appointed Agent Authorised By Them To Facilitate The Affairs Of The Consortium

[7] It is the submission of the plaintiff's counsel that this issue should be decided in the affirmative. Plaintiff's counsel's contention was that the parties were either unregistered partnership Consortium undertaking the works for China Yunnan using the third defendant as a vehicle to facilitate dealing with China Yunnan or that they were individual subcontractors undertaking the works for the third defendant who in turn were subcontractors of the works for China Yunnan. Learned counsel had listed ten reasons for this assertion. In summary they are: The third defendant is a shell company with nominal paid up capital of RM100,000; has no office and no staff of its own; PW1, 1DW1 and 2DW2 were the shareholders and/ or the directors; the works were apportioned to the parties with no margin to the third defendant and without involving the third defendant at all; third defendant had no entitlement or share or profit or not liable for any loss under the subcontract; third defendant paid for its administrative cost and expense for performing its functions; the third defendant was only a clearing entity for payments from China Yunnan; all matters related to the project were decided by the Consortium's members; the parties used the third defendant's letterhead; there was no subcontract agreements between the third defendant and the parties. It is also the submission of learned counsel that in law a partnership does not require to be in writing or to be registered with the Business Names Registry.

[8] Learned counsel for the plaintiff submitted that if the parties are unregistered partnership Consortium, it followed that the third defendant would be their appointed agent authorized by them to facilitate the affairs of the Consortium with China Yunnan.

[9] Learned counsel for the first and second defendants asserted that there was never such a Consortium. It is learned counsel's submission that the plaintiff could not even confirm when the Consortium was formed, whether it was in August 2003 or in July 2004 after commencement of the works or much earlier for an earlier project. Learned counsel also submitted that the plaintiff's documents and testimonies showed the involvement of three other companies, namely "Angkit Anyu Sdn Bhd", "Pavetech" and "Chiew Kee" and yet had not named the second defendant in exh. ABD which the plaintiff claimed to be a statement of account for the alleged Consortium. Learned counsel for the first and second defendants also submitted the plaintiff had not produced any direct document to prove the parties had formed the Consortium. It is the assertion of learned counsel that the role of the third defendant as described by the plaintiff ran against the existence of the alleged Consortium since it is in evidence that the third defendant was to enter agreement with China Yunnan, to receive the payment and pay the money received to the parties who carried out the works. Learned counsel's assertion was that the first and second defendants were subcontractors engaged by the third defendant to carry out different portion of the works and was paid accordingly. Learned counsel cited *Direct Scope Sdn Bhd v. Kolektra Recreation Sdn Bhd & Maseba Sdn Bhd* [2013] 1 LNS 1408 (Kuala Lumpur High Court Civil Suit No. S3-22-932-2008): In Su Geok Yiam J's word in *Direct Scope Sdn Bhd*, (*supra*), the plaintiff, the first defendant and second defendant "were not carrying on business with a view or desire to generate a common profit" and "not a partnership as defined by section three of the Partnership Act 1961". Learned counsel submitted this issue should be decided in the negative.

Whether The Plaintiffs Are Entitled To The Sum Claimed

[10] Learned counsel for the plaintiff submitted that the real issue here is not the quantum of the plaintiff's claim but on whether the plaintiff had sued the right parties namely the first and second defendants. Learned counsel had contended that the evidence of the plaintiff in Q12, Q13, Q14, Q15, Q16, Q17, Q18 and Q19 of WSPW1 was not challenged and not rebutted as such the same ought to be accepted. The plaintiff is therefore entitled to the sum claimed.

[11] Learned counsel for the first and second defendants submitted that the plaintiff had not produced any documentary evidence such as statement of account to substantiate its claim for the RM1,323,059.18. It is also their submission that the plaintiff's claim is time barred. Learned counsel had identified four dates when the plaintiff ought to have brought its claim against the defendants and they are: (i) on 22 July 2006 when the works for the

project were completed; or (ii) on 13 February 2007 when the account was allegedly rendered to the plaintiff, or (iii) on 21 July 2007 when the defects liability period expired; or (iv) on 10 August 2007 when payment certificate No. 34 (Final) was allegedly issued. It is therefore learned counsel's contention that the limitation periods are three years from the accrual date. The plaintiff ought to have filed its action by 21 July 2009 or 12 February 2010 or 20 July 2010 or the latest 9 August 2010 and in filing this suit on 25 April 2011 the plaintiff's action is time barred.

Whether The First And Second Defendants Are Liable To Account To The Plaintiff The Sum Claimed Or Such Other Sum After The Taking Of Such Account

[12] It is the submission of learned counsel for the plaintiff that the first and second defendants are liable to account to the plaintiff the sum claimed or such other sum after the taking of such account. The plaintiff is entitled to an account of the partnership Consortium citing s. 3 Partnership Act 1961 (Act 135).

[13] On this issue, learned counsel for the first and second defendants submitted that the first and second defendants were subcontractors engaged by the third defendant to carry their respective portions of the works. It is the submission of learned counsel that the third defendant had received the payment from China Yunnan and had disbursed the payments to all the parties. It is also the submission of learned counsel that the first and second defendants are not the shareholders and/or directors of the third defendant as such they are not in the position to account to the plaintiff for any amount due to the plaintiff or to cause the third defendant to make any payment to the plaintiff. It is further asserted by learned counsel that the first and second defendants should not be liable to indemnify the plaintiff who was engaged as subcontractor for the works for any contract price due from China Yunnan. It is further contended there was no evidence produced by the plaintiff to suggest that both the first and second defendants are responsible for the contract price due to the plaintiff.

[14] Now there are three agreed issues here. I think issue (1) would determine this suit. It was with this in mind that I had directed parties in clarification to address me on (a) the law on partnership where there is no partnership agreement and (2) the requisite proof of a partnership. I thank both counsel for their inputs on this matter.

[15] The law applicable in Malaysia is the Partnership Act 1961 (Act 135) (the legislation). I think I should refer to the following relevant sections so that we are all focus on what we are talking about:

> Section 2 (Interpretation) among others provide that "business" includes every trade, occupation or profession.

A Section 3 (Definition of partnership) *inter alia* provides "Partnership is the relation which subsists between persons carrying on business in common with a view to profit".

Section 4 (Certain circumstances not prima facie partnership) determines whether a partnership does or does not exist and there are 10 rules
B therein.

[16] Here the plaintiff says the relationship of the parties is one of partnership. The first and second defendants disputed this. In this present case the Consortium has no partnership agreement. Thus in *Chua Ka Seng v. Boonchai Sompolpong* [1993] 1 SLR 482, the Court of Appeal in Singapore
C ruled that in the absence of a written partnership agreement, one has to rely on the Partnership Act 1890 to determine whether a partnership exists or not. Though a Singaporean case it equally applies to the Partnership Act 1961 (Act 135).

[17] In *Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor* [1991]
D 3 CLJ 2834; [1991] 2 CLJ (Rep) 294; Peh Swee Chin J was of the view to ascertain whether there exist a partnership one has to determine if the relation as defined in s. 3(1) of the Partnership Act existed:

In my view, to find the existence of such relation, the court must find the real intention of the parties in dispute or involved. The real intention is
E not necessarily the express intention of the parties so that even if the parties express they are partners, the court may decide to the contrary after the court considers all relevant factors taken together …

[18] In the Federal Court case of *Chooi Siew Cheong v. Lucky Heights Development Sdn Bhd* [1995] 2 CLJ 11, the Federal Court held:

F The term "partnership" is defined in s. 3(1) of the Act as the relationship which subsists between persons carrying on a business with a view to profit. In deciding whether a partnership exists, the Court must have regard to the relevant rules in s. 4 of the Act and intention of the parties.

... it is incumbent on the court to ascertain the intentions of the parties
G based on the whole facts of the case … to decide whether there is a particular relationship.

[19] In *Tham Kim Fai v. Ng Kon Seong* [2006] 4 CLJ 634 Abdul Malik Ishak J (as he then was) identified what he called "three essential elements" that must be present in the relation of persons before it is recognised as a
H "partnership", namely:

(a) There must be a business;

(b) Carried out in common between the partners; and

I (c) With a view to making profit.

[20] Having discussed what the laws are on the creation of partnership I shall now consider whether the parties are in partnership.

[21] But first let me analyse the salient points of this case. PPES Works had subcontracted to China Yunnan the said works. On 30 September 2003 China Yunnan had also subcontracted the said works to the third defendant for RM19,060,000. The third defendant then allocated portions of the said works to the plaintiff, first defendant and Bangkit Anyau Sdn Bhd (BASB) at an agreed subcontract sums. BASB was subsequently replaced by the second defendant which then appointed SBP Contractor Co to complete the rest of the portion of the said works initially allocated to BBSB. The third defendant received payments from China Yunnan and made payments to the parties in respect of their portions of the works completed based on the sub-contract sums.

[22] How do I conclude the whether the Consortium is a partnership of the plaintiff, first defendant and second defendant. I must look at the real intention of the parties ie whether they are carrying on business in common with a view to profit. Now from the evidence the alleged Consortium apparently came into existence in August 2003 or July 2004. But let me quickly look at the status of the second defendant. The learned counsel or the second defendant's contention was that the plaintiff had wrongly sued the second defendant. I think this contention is correct. When the alleged Consortium was set up the parties would be the first plaintiff, first defendant and BASB but not the second defendant as it was only in 2006 that it took over the portion of the works allotted to BASB. The second defendant was then not "a partner" unless there is evidence that suggest otherwise then it should not be sued at all. I agree with the defendants' counsel contention that the plaintiff had sued the wrong party.

[23] Now let us go to the basics. Were the parties in relationship? Section 3 of the Partnership Act is very clear on this which have been expounded in decided cases like those which I have alluded to above. There are three essential elements that must be present in the relation of persons before it is recognised as a "partnership" and they are (a) there must be a business; (b) carried out in common between the partners; and (c) with a view to making profit (see *Tham Kim Fai*, *supra*). I shall now sieve through the evidence whether these three elements have been satisfied.

Is There A Business?

[24] Every type of trade, occupation or profession is capable of being a business. I think the parties are all in the construction business. There is a business here. The parties are to undertake certain works allotted to them by the third defendant in respect of the construction and completion of the proposed Jalan Ng. Bangkit/ Muara Lebaan, Bintangor, Sarikei Division, Sarawak. The parties would be paid by the third defendant at the agreed amount of subcontract sums for their respective portions of the said works. I think this element is satisfied.

Is The Business Carried Out In Common Between The Parties?

[25] Perhaps I should begin by defining what is "in common". According to the *Concise Oxford Dictionary* (9th edn):

> "In Common" - 1. in joint use; shared 2. of joint interest.

This leads me to ask whether the plaintiff had proven this second element. Now it is in evidence that the third defendant had allotted to the parties their respective portions of the said works. The portions of the works were put in written form (p. 31 exh. ABD) and the subcontract sums payable to the parties (Q12A13 p. 29 NOP). PW1 said:

> Under this consortium, each one undertake different portion of work. 2nd defendant came in to undertake the road portion of the work as a consortium member. So I don't look into the road work portion.

PW1 also explained "In order to execute the project, each one of us undertook different portion of works thus there is no overlapping of works by any of the partners. This is also to avoid any dispute over payment which the partners are entitled to" (Q21A22 p. 29 NOP). PW1 agreed that third defendant would receive payment of subcontract price from China Yunnan and to be disbursed to the parties (see p. 59 Q3A5 and Q7A10). There you are, that explained why learned counsel for the defendants submits that the parties were not partners. I agree with this submission because the evidence showed that the plaintiff had its own portion of the works, likewise the first and second defendants. The parties had full control of their portions of the works to the exclusion of the others. The parties received payments directly from the third defendant with liberty to spend the same without restrictions from the Consortium or the plaintiff, first and second defendants. The plaintiff had not proven this second element as well.

Is The Business Carried Out In Common Between The Parties With A View To Making Profit?

[26] The basic idea of partnership is that the business is set up for the sake of a making money. According to the *Concise Oxford Dictionary* (9th edn):

> Profit: 1. an advantage or benefit 2. financial gain; excess of returns over outlay.

From the evidence, there is no dispute that the parties were allotted their respective portion of the works for agreed subcontract sums. The parties carried out their works independently then upon completion the third defendant paid to the parties the subcontract sums as agreed. There is no evidence led by the plaintiff that all payments made by the third defendant would be put in the Consortium's account or bank account. There was no evidence of the profit of the so called Consortium for distribution to the parties. Sadly, this element has not been proven.

[27] Having considered the three elements, I find that there is no business in common with a view to make profit. I might also add here that from the facts and evidence there was not a single business by the parties. It would be one single business where the works were subcontracted to the Consortium. But here the third defendant had instead subcontracted to the parties their respective portions of the works. With this scenario, I can only conclude that the parties actually intended a separate business for each of them. In *Chooi Siew Cheong*, *supra*, the Federal Court found from the facts and circumstances that there was not "a single business by the parties" and that each party actually intended a separate business with there being no "business in common".

[28] Assuming there exist a partnership, I should also consider whether the plaintiff's action is time barred. The first and second defendants submitted that is so. Learned counsel for the first and second defendants contention is the plaintiff ought to have brought its claim against the defendants: (i) on 22 July 2006 when the works for the project were completed; or (ii) on 13 February 2007 when the account was allegedly rendered to the plaintiff, or (iii) on 21 July 2007 when the defects liability period expired; or (iv) on 10 August 2007 when payment certificate No. 34 (Final) was allegedly issued. Learned counsel submitted that the limitation periods are three years from the accrual date. The plaintiff ought therefore to have filed its action by 21 July 2009 or 12 February 2010 or 20 July 2010 or the latest 9 August 2010 and in filing this suit on 25 April 2011 the plaintiff's action is time barred. I agree with learned counsel for the first and second defendants that the plaintiff's action against the first and second defendants.

[29] In the premises, the plaintiff has not proven on a balance of probability its case on the alleged partnership on the Consortium. On this ground, I dismiss the plaintiff's action against both the first and second defendants with costs of RM10,000 each to the first and second defendants.